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Reforming Legal Education to Prepare Law Students Optimally for Real-World Practice

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SYMPOSIUM

Reforming Legal Education to Prepare Law Students Optimally for Real-World Practice

John Lande*

I. INTRODUCTION

There is a growing consensus that American law schools need to do a better job of preparing students to practice law.¹ Teaching students to "think like a lawyer" is still necessary but it is not sufficient for students to act like a lawyer soon after they graduate. Training lawyers is especially difficult because lawyers work on many types of problems, both when handling disputes and negotiating transactions. Some legal disputes are resolved at trial or on appeal, but most are resolved through other processes in the "shadow of the law."² Although legal education has evolved in recent decades, the legacy of the Langdellian system³ makes it hard to combine instruction in legal doctrine, practical skills, and clinical experience. Recognizing the general problems of legal education is fairly easy; solving them can be quite hard. Law schools serve many constituencies that have demanding and diverse interests. Needed time and money are scarce and there is no one-size-fits-all solution.

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1. See Lisa A. Kloppenberg, *Training the Heads, Hands and Hearts of Tomorrow's Lawyers: A Problem Solving Approach*, 2013 J. DISP. RESOL. 103, 112 (2013) (citing ABA curriculum survey finding that law schools want to produce "practice-ready" lawyers, responding, in part, to feedback from legal employers).

2. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950, 997 (1979).

3. In the late nineteenth century, Harvard Law School Dean Christopher Columbus Langdell initiated a system of legal education that largely persists to the present, albeit with some modifications. The hallmarks of the system involves the use of the "case method," in which students analyze legal doctrine explained in appellate cases, as well as the Socratic method, in which students present the facts and law in each case and the instructors ask questions to identify the legal principles reflected in the case. See A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 1973-78 (2012).

On October 19, 2012, the Center for the Study of Dispute Resolution (the “Center”) at the University of Missouri School of Law held its annual symposium to focus on these issues.⁴ This symposium was not particularly about improving dispute resolution (“DR”) instruction nor increasing dispute resolution instruction in law schools, though both are worthy topics for analysis. Rather, the Center sponsored the symposium as part of the tradition of reform in the legal system and legal education. The field is often called “alternative dispute resolution,”⁵ though it might more appropriately be called “innovative dispute resolution.” The history of the legal system in the U.S. includes a long series of DR innovations including, but not limited to, commercial arbitration, workers compensation systems, juvenile courts, family courts, small claims courts, labor arbitration, court-connected arbitration, court-connected mediation, and collaborative and cooperative law, among others. Many of these innovations were seen as quite radical when they were first introduced. Over time, they became institutionalized and so widely accepted that they have become accepted as a normal part of the legal system.⁶ For example, “ADR” is not an “alternative” to trial if parties cannot go to trial without first attempting mediation or if they cannot go to trial at all when bound by pre-dispute arbitration agreements. Indeed, DR innovations have become so institutionalized that some of these innovations developed problems that they were intended to correct. Thus many modern DR practitioners and scholars focus on reforming old reforms.⁷

There is a parallel of some innovation in legal education led by DR academics. At Missouri, we have a proud tradition going back almost thirty years of innovation in DR education.⁸ In the 1980s, DR instruction was still fairly radical in law schools. Missouri was probably the first law school to require all students to have some exposure to DR instruction, starting in the first year of law school. About twenty years later, we reformed our signature first-year pedagogy, switching from incorporating DR in all the first-year courses to requiring all first-year

4. We owe great thanks to an outstanding group of speakers, every one of them would be a great keynoter. Our speakers included Clark Cunningham, Barbara Glesner Fines, David Moss, Judge Solomon Oliver, Jr., John Phillips, and Judith Welch Wegner. We asked Lisa Kloppenberg to keynote because she embodies both tradition and innovation. She is a former law school dean and expert in constitutional law who is also a co-author of a leading dispute resolution text and the leader of her law school’s strategic planning process that developed a celebrated set of curricular reforms.

Thanks to former dean Larry Dessem and Center director Bob Bailey for supporting the plan for this symposium. Paul Ladehoff, Thom Lambert, David Mitchell, Rigel Oliveri helped in planning the symposium. Melody Daily, David Mitchell, and Rigel Oliveri hosted symposium sessions. Laura Coleman provided a lot of logistical help in organizing the symposium. Karen Neylon and Casey Baker helped with publicity, Jody Bryson developed the symposium website, Scott Weiser videotaped the symposium for the website, and Journal of Dispute Resolution editors, especially Shane Blank, Collin Koenig, and Emily Walker, helped with the in-person and published symposium. Videos of the symposium can be viewed at <http://law.missouri.edu/csdr/symposium/2012/>.

5. The term “alternative dispute resolution” (or “ADR”) is problematic but it has become “embedded in the vernacular and hard to avoid.” John Lande, *Principles for Policymaking about Collaborative Law and Other ADR Processes*, 22 OHIO ST. J. ON DISP. RESOL. 619, 620-21 n.1 (2007).

6. *See id.*

7. Dispute resolution scholars have a rich tradition of proposing innovations, often based on critiques of prior innovations. For just two recent examples, *see* Jacqueline Nolan-Haley, *Mediation: The “New Arbitration”*, 17 HARV. NEGOT. L. REV. 61 (2012); Thomas J. Stipanowich, *Arbitration: The “New Litigation”*, 2010 U. ILL. L. REV. 1.

8. *See* Leonard L. Riskin & James E. Westbrook, *Integrating Dispute Resolution into Standard First-Year Law School Courses: The Missouri Plan*, 39 J. LEGAL EDUC. 509 (1989).

students to take a DR-focused course, Lawyering: Problem-Solving and Dispute Resolution.⁹ Over time, other schools incorporated DR into their programs so that, today, virtually every law school offers some DR instruction.¹⁰ At least seventeen law schools require all students to have some DR instruction.¹¹ An ABA standard requiring law schools to teach professional skills includes DR in the list of skills satisfying the requirement.¹² Although DR instruction is not yet completely recognized as a normal and valued part of legal education, most law professors probably consider it as an acceptable, if not desirable, part of the curriculum.

The contributions of DR innovators to the development of legal practice and legal education make it particularly appropriate for Missouri's DR Center to sponsor this symposium. Just as DR practitioners have worked to improve the legal system, rather than create a completely separate DR system, DR academics have worked to become an integral part of the system of preparing law students to be good lawyers.

We should be realistic about the challenges in preparing law students for real-world practice. Hindsight can create the illusion that innovation is inevitable or easy. In reality, innovation in legal practice, DR, and legal education is very hard and contingent on the convergence of various factors, especially the determination of key actors to proceed.

This article synthesizes some of the main points of the symposium contributors.¹³ They covered a very wide range of key issues and thus this symposium provides a good overview of the challenges of and options for legal education reform.¹⁴ Of course, given the vast scope of the problems presented, this symposium issue of the Journal of Dispute Resolution cannot provide an all-encompassing analysis nor a comprehensive set of recommendations for reform.

9. See John Lande & Jean R. Sternlight, *The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering*, 25 OHIO ST. J. ON DISP. RESOL. 247, 270-71 (2010).

10. See Kloppenberg, *supra* note 1, at 114-15 (citing 2010 ABA curriculum survey showing that courses in ADR, mediation, and negotiation are among most common skills courses in law schools).

11. See *Legal Education, ADR, and Practical Problem-Solving (LEAPS) Project: Curriculum Models*, A.B.A. SEC. DISP. RESOL., <http://leaps.uoregon.edu/content/curriculum-models> (last visited Aug. 22, 2013).

12. See 2012-2013 ABA STANDARDS AND RULES OF PROC. FOR APPROVAL OF LAW SCHS., A.B.A. SEC. LEGAL EDUC. & ADMISSIONS B., Standard 3.02(a)(4), Interpretation 302-2, at 20, available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/chapter_3_2012_2013_aba_standards_and_rules.authcheckdam.pdf [hereinafter "ABA STANDARDS"].

13. The symposium focused primarily on actions that law schools and their faculty can take to increase practical education of law students. Of course, other entities contribute to these efforts to improve the quality of legal services. For example, law firms can do more to promote their lawyers' practice skills. See, e.g., Clark D. Cunningham, *What Do Clients Want From Their Lawyers?*, 2013 J. DISP. RESOL. 143, 154-57 (2013) (suggesting measures including conducting client surveys, observing client interviews and giving structured feedback, and including client communication as a criterion for lawyer evaluation). Moreover, various national organizations can take additional steps to improve the system of legal education. See Judith Welch Wegner, *Cornerstones, Curb Cuts, and Legal Education Reform*, 2013 J. DISP. RESOL. 33, 74-76 (2013) (making recommendations for the American Bar Association's Council of Legal Education and Admission to the Bar, the Association of American Law Schools, the Law School Admissions Council, the National Conference of Bar Examiners, and the Association for Legal Career Professionals).

14. Some statements in this article are specifically attributed to symposium contributors but otherwise, this article does not necessarily represent their views.

We do however, hope that it will be a useful contribution to the growing movement and literature designed to improve legal education in the U.S.

Part II of this article catalogs a long—and growing—list of difficult pressures that law schools must cope with. Part III provides an overview of general processes and possible goals that schools might adopt in educational reform efforts. Part IV describes some options for improving practical education of law students. Part V is a conclusion.

II. PRESSURES ON LAW SCHOOLS

The current legal education reform movement builds on a history of more than a century of criticism and recommendations for reform. Experts have called for reform in a series of reports including an ABA Reports issued in 1879¹⁵ and 1890,¹⁶ the 1914 Redlich Report,¹⁷ 1921 Reed Report,¹⁸ 1971 Carrington Report,¹⁹ 1979 Cramton Report,²⁰ 1982 MacCrate Report,²¹ 2007 CLEA Best Practices Report,²² and the 2007 Carnegie Report.²³ These reports and other analyses repeatedly faulted law schools for over-emphasizing instruction in legal doctrine and analysis at the expense of practical legal training.²⁴ Based on surveys of lawyers, researchers have found that law school graduates are insufficiently prepared to perform important legal tasks including diagnosing and planning solutions for legal problems, instilling others' confidence, negotiation, fact gathering, drafting legal documents, counseling, obtaining and keeping clients, and managing legal work.²⁵ Professor Lisa Kloppenberg reported that, in the educational reform process at the University of Dayton, the Dayton faculty consulted with the school's alumni and employers of their graduates, who reported that law school graduates need improved writing skills, greater familiarity with negotiation, mediation, and motion practice (rather than trial and appellate work), and greater professionalism

15. Carleton Hunt, *Report of the Committee on Legal Education and Admissions to the Bar*, 2 AM. B. ASS'N REP. 209, 219 (1879).

16. WILLIAM G. HAMMOND ET AL., REPORT ON THE COMMITTEE OF LEGAL EDUCATION: PRESENTED AT THE MEETING IN BOSTON 51 (Aug. 26, 1891).

17. JOSEF REDLICH, THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS (1914).

18. ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 334-45, 403 (1921).

19. Paul D. Carrington, *Training for the Public Professions of the Law: 1971*, ASS'N AM. L. SCHS., pt. 1, § 2 (1971), reprinted in HERBERT L. PACKER & THOMAS EHRLICH, NEW DIRECTIONS IN LEGAL EDUCATION 93 (1972).

20. Roger C. Cramton, *Report and Recommendations of the Task Force of Lawyer Competencies: The Role of Law Schools*, A.B.A. SEC. LEGAL EDUC. & ADMISSIONS B. 1 (1979).

21. Robert MacCrate, *Legal Education and Professional Development – An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, A.B.A. SEC. LEGAL EDUC. & ADMISSIONS B. 8 (1992).

22. ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 7 (2007).

23. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 185 (2007) (referred to as the “Carnegie Report”).

24. For discussion of the prior reports, see, e.g., DAVID I. C. THOMSON, LAW SCHOOL 2.0: LEGAL EDUCATION FOR A DIGITAL AGE 59-67 (2009); Lande & Sternlight, *supra* note 9, at 256-59; John O. Sonsteng et al., *A Legal Education Renaissance: A Practical Approach for the Twenty-First Century*, 34 WM. MITCHELL L. REV. 303, 363-88 (2007); Spencer, *supra* note 3, at 1982-2015.

25. See Sonsteng, *supra* note 24, at 378-89.

and maturity in dealing with clients and colleagues.²⁶ Professor Clark Cunningham summarizes additional research showing clients' predominant complaints about their lawyers focus on poor communication and inattention to clients' needs.²⁷ John Phillips said that when his firm is hiring lawyers, it looks for prospective employees' ability to work well with clients and help solve their problems.²⁸

A 2010 survey by the American Bar Association Section of Legal Education and Admissions to the Bar shows that, to some extent, law schools have revised their curricula in the last decade to increase practical education.²⁹ Under A.B.A. Standard 302(a)(4), students must receive "substantial instruction" in "professional skills generally regarded as necessary for effective and responsible participation in the legal profession."³⁰ The A.B.A. curriculum survey found that most of law schools met this requirement by requiring students to take at least two-or-three credits of skills courses.³¹ While this is a step in the right direction, it does not seem sufficient to make a significant difference in the level of students' skills at graduation.

Considering that experts have identified the need for educational reform for a very long time, will law schools' historically inadequate responses (if any) be any different now? There seems to be a greater focus on educational reform in recent years. Law schools are facing what Professor A. Benjamin Spencer calls a "perfect storm" of pressures.³² Symposium contributors identified many pressures on law schools, some of which may lead to increased practical education though some may actually limit schools' abilities or motivations to move in that direction. These pressures include the following.

Law School Market Pressures

- shrinking pool of law school applicants³³
- negative publicity due, in part, to misleading consumer information that exaggerates the benefits of law degrees³⁴

26. See Kloppenberg, *supra* note 1, at 106.

27. See Cunningham, *supra* note 13, at 144.

28. John R. Phillips, partner in the Husch Blackwell LLP law firm in Kansas City and chair of the A.B.A. Section of Dispute Resolution, Remarks at University of Missouri School of Law Symposium, *Overcoming Barriers in Preparing Law Students for Real-World Practice* (Oct. 19, 2012), <http://law.missouri.edu/csdr/symposium/2012/videos.html>.

29. See A.B.A. SEC. LEGAL EDUC. & ADMISSIONS B., A SURVEY OF LAW SCHOOL CURRICULA: 2002-2010 (Catherine L. Carpenter ed. 2012) [hereinafter "ABA SURVEY"]. For discussion of the survey results, see Kloppenberg, *supra* note 1, at 112-18; Solomon Oliver, Jr., *Educating Law Students for the Practice: If I Had My Druthers*, . . . , 2013 J. DISP. RESOL. 85, 93-95.

30. ABA STANDARDS, *supra* note 12, at 20. Students can satisfy this requirement by taking a variety of courses, which may or may not be related to the rest of their studies. *Id.* Interpretation 302-2 states: "Trial and appellate advocacy, alternative methods of dispute resolution, counseling, interviewing, negotiating, problem solving, factual investigation, organization and management of legal work, and drafting are among the areas of instruction in professional skills that fulfill Standard 302 (a)(4)." *Id.*

31. ABA SURVEY, *supra* note 29, at 42.

32. Spencer, *supra* note 3, at 1951-53.

33. Kloppenberg, *supra* note 1, at 134; Wegner, *supra* note 13, at 35.

- increased number of law schools, leading to increased competition between law schools to get students and between law school graduates to get jobs³⁵
- need to maximize (or at least not fall in) the U.S. News rankings³⁶
- high tuition levels and large student debt loads³⁷
- reduced job market opportunities and income for law school graduates³⁸
- demands by various constituencies that law schools do more to prepare new lawyers for practice, both for graduates working in big firms—whose clients are less willing to pay for new lawyers' time during law firms' traditional "apprenticeship" period—as well as graduates working in solo practices or small firms that cannot provide much mentoring³⁹

Pressures to Prepare Students for Changing Legal Practice

- increasing demands by clients for greater efficiency in legal services⁴⁰
- increasing influence of technology on law practice⁴¹
- growth of alternatives to traditional litigation and changes in court-connected dispute resolution processes⁴²
- unbundling of legal services⁴³
- increasing competition from non-lawyers⁴⁴
- globalization of the law and legal practice⁴⁵

34. See Ben Trachtenberg, *Law School Marketing and Legal Ethics*, 91 NEB. L. REV. 866 (2013).

35. Kloppenberg, *supra* note 1, at 107.

36. Wegner, *supra* note 13, at 46-48.

37. Barbara Glesner Fines, *Out of the Shadows: What Legal Research Instruction Reveals About Incorporating Skills throughout the Curriculum*, 2013 J. DISP. RESOL. 159, 178; Kloppenberg, *supra* note 1, at 105-106; Wegner, *supra* note 13, at 35-37.

38. Kloppenberg, *supra* note 1, at 105-107, 112-117; Oliver, *supra* note 29, at 94; Phillips, *supra* note 28; Wegner, *supra* note 13, at 35.

39. Kloppenberg, *supra* note 1, at 105-106, 111; Phillips, *supra* note 28; Wegner, *supra* note 13, at 36.

36. For further discussion of demands for improved education in practical skills, see *supra* notes 15-23 and accompanying text.

40. Oliver, *supra* note 29, at 95.

41. Kloppenberg, *supra* note 1, at 105-107; Wegner, *supra* note 13, at 36.

42. Kloppenberg, *supra* note 1, at 105-107; Phillips, *supra* note 28.

43. Wegner, *supra* note 13, at 36.

44. *Id.*

45. Kloppenberg, *supra* note 1, at 106; Wegner, *supra* note 13, at 36.

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Curricular Pressures

- need to maximize student bar passage rate;⁴⁶
- interest in maximizing “coverage” of topics in courses, especially bar courses⁴⁷
- skepticism by some faculty about the value of skills courses and a belief that students should learn practical skills after graduation⁴⁸
- high priority for law schools and individual faculty to focus on producing prestigious scholarship, reducing time available for instruction⁴⁹
- increased curricular requirements in current and proposed ABA standards⁵⁰

Organizational Pressures Within Law Schools

- time pressure on faculty, staff, and administrators due to increasing work expectations⁵¹
- reluctance of some faculty to change an educational process that they believe worked well for them as students⁵²
- competing views among law faculty about optimal educational goals and methods, which are often related to the approaches they use and their personnel status as doctrinal, clinical, or legal writing faculty⁵³
- effects of the tenure system, which can reduce the interest and ability of faculty to collaborate⁵⁴
- need for greater diversity in law schools and the legal profession⁵⁵

Pressures to Satisfy Students’ Needs

- variation in students’ readiness for law school, including significant problems of gaps in professional preparation and inadequate student abil-

46. Lande & Sternlight, *supra* note 9, at 272-74; Wegner, *supra* note 13, at 55.

47. Glesner Fines, *supra* note 37, at 183-184; Lande & Sternlight, *supra* note 9, at 273.

48. Glesner Fines, *supra* note 37, at 177-78; Lande & Sternlight, *supra* note 9, at 274-75.

49. Lande & Sternlight, *supra* note 9, at 271-75.

50. Kloppenberg, *supra* note 1, at 111-118, *passim*, 142.

51. Lande & Sternlight, *supra* note 9, at 250.

52. *Id.* at 274.

53. Glesner Fines, *supra* note 37, at 176-183; Lande & Sternlight, *supra* note 9, at 272-75.

54. Lande & Sternlight, *supra* note 9, at 272.

55. Kloppenberg, *supra* note 1, at 105-107.

ities as well as varied learning needs of digital-age, second career, disadvantaged, disabled, and international students⁵⁶

- difficulty keeping students engaged in course work after the first year of law school⁵⁷
- pressures on lawyers to specialize early in their careers, leading to increasingly specialized curricula⁵⁸

Institutional Pressures

- increasing demands for strategic planning by law schools⁵⁹
- increasing law school budget constraints⁶⁰
- relatively high cost of clinical and skills courses compared with doctrinal courses⁶¹
- reduced funding from universities and law school donors⁶²

Although law schools have faced many of these pressures in the past, the number and intensity of the pressures has increased markedly in recent years. Recognition of the need for reform has become conventional wisdom within the legal academy, especially since the publication of the Carnegie Report in 2007.⁶³ Even when law school faculty and administrators have a serious desire to improve the practical education provided by their schools, however, the process for planning and implementing such changes can be quite challenging due to the multiple pressures that often push in different directions.

III. EDUCATIONAL REFORM PROCESSES AND GOALS

Based on her work on education reform in the field of architecture, Professor Judith Welch Wegner uses a “cornerstone” metaphor referring to “key principles that can provide meaningful foundations for moving forward with curriculum reform” and a “curb cut” metaphor for “practical strategies for overcoming barriers to change.”⁶⁴ She identifies current cornerstones involving certain economic

56. *Id.*; Wegner, *supra* note, at 37-38.

57. Kloppenberg, *supra* note 1, at 105-107.

58. *Id.*; Lande & Sternlight, *supra* note 9, at 272; Phillips, *supra* note 28; Wegner, *supra* note 13, at 38.

59. Kloppenberg, *supra* note 1, at 139.

60. *Id.* at 138; Wegner, *supra* note 13, at 35. See also Glesner Fines, *supra* note 37, at 178 (“As programs and missions expand, while resources diminish, constant underfunding is ‘the new normal’ in education”).

61. Lande & Sternlight, *supra* note 9, at 274.

62. Kloppenberg, *supra* note 1, at 113; Wegner, *supra* note 13, at 36.

63. See Wegner, *supra* note 13, at 50.

64. *Id.* at 34.

and professional expectations, as well as intellectual and educational assumptions, and she recommends future cornerstones involving a good understanding of change, development of appropriate mental models, use of systems thinking, and use of appropriate student assessment systems.⁶⁵ She proposes “curb cut” strategies building on current change processes that include use of new mental models, roles for national organizations involved with legal education, and assessment strategies.⁶⁶

Citing organizational change literature, Wegner argues that change depends on organizations’ capacity to engage in learning, recognize and shape their institutional culture, and manage internal relationships.⁶⁷ In addition to considering organizational dynamics generally, higher educational institutions have distinctive features that affect decision-making. These include ambiguity of goals, a high priority for achieving institutional prestige, loose coupling of institutions internally and externally, some autonomy due to academic freedom, a shared governance process, and a pattern of organized analytical decision-making.⁶⁸ Based upon ideas from Peter Senge’s book, *The Fifth Discipline*,⁶⁹ she argues that law schools should engage in “systems thinking,” which recognizes the synergy between the various elements in their enterprise to create to a cohesive organizational whole. For example, she suggests that schools should “consider the ties between student demand, admissions standards, faculty characteristics, teaching strategies, employment opportunities and law school revenues.”⁷⁰

Wegner argues that law schools need good “mental models” to undertake effective reform. She identifies three common (and often unconscious) mental models that guide—and limit—how legal educators think and act. One model is the pursuit of prestige within the academic hierarchy, which can promote higher quality but, paradoxically, can actually result in reduced quality when the striving to obtain prestige markers undermines the fundamental educational mission.⁷¹ “A second mental model plagues legal education, namely the treatment of *U.S. News & World Report* rankings as a proxy for institutional quality, notwithstanding the serious flaws associated with the rankings’ methodology.”⁷² Although legal academics regularly (and appropriately) bemoan these flaws and the resulting dysfunctional institutional dynamics, most of us feel powerless to resist taking it into account, at least to some extent, in our decision-making. A third model derives from the accreditation standards of the American Bar Association’s Council of the Section on Legal Education and Admission to the Bar. Obviously, the standards affect educators’ mental models since accredited schools must comply with the standards, which can both promote and inhibit innovation.⁷³

65. *Id.* at 34-63.

66. *Id.* at 63-84.

67. *Id.* at 39.

68. *Id.* at 39-40.

69. PETER SENGE, *THE FIFTH DISCIPLINE: THE ART AND PRACTICE OF THE LEARNING ORGANIZATION* (1990).

70. Wegner, *supra* note 13, at 53-54. Systems thinking is especially important in tackling “wicked problems,” which “lack easy or straightforward principles to guide their resolution,” such as how to “prepare law students adequately for a rapidly changing professional climate.” *Id.* at 53.

71. *Id.* at 44.

72. *Id.* at 46.

73. *Id.* at 49.

Although law schools must deal with these three models as a practical matter, Wegner recommends that law schools intentionally employ additional models, such as the notion of “apprenticeships” in the Carnegie Report or “transition to practice” used in her University of North Carolina School of Law.⁷⁴ As another example, the University of Dayton used the model of “lawyer as problem-solver” to drive its reform process.⁷⁵

Education Professor David Moss argues that legal education should be a form of liberal education in which students learn to “consider issues from many perspectives” and develop ideas based on “well-reasoned arguments and persuasive reasoning.”⁷⁶ Law school curricula should “not leave the big picture hidden or up to chance, but purposefully and systematically help[] law students understand how the various elements of their professional practice fit together.”⁷⁷ Moss recommends that law schools “map” their curricula in order to understand how their program elements fit together, determine how well the curricula meet their goals, and identify significant gaps between their goals and existing programs.⁷⁸ Curriculum mapping should not be merely a technical task producing a static product but rather a tool to engage faculty in data collection and analysis of possible reforms.⁷⁹ Moreover, he argues that planners should analyze curricula holistically rather than simply as a collection of courses.⁸⁰ In doing so, they should consider the “hidden curriculum”—the “socialization process where students pick up messages through the experience of being in school and interacting with faculty and peers, not just from things that they are formally taught.”⁸¹

A major premise of the hidden law school curriculum, repeated in multiple courses, is that lawyers primarily engage in appellate practice and that other activities are less common or important.⁸² Analyzing results from the 2010 ABA curriculum study,⁸³ Professor Barbara Glesner Fines shows that about 80-85% of the first year curriculum, and almost all required courses, focus on doctrinal instruction. In addition, only a small percentage of the elective curriculum deals with legal skills, and law students generally have limited clinical and externship course opportunities.⁸⁴ The hidden curriculum is not limited to course content but also includes messages based on the status of faculty teaching particular courses, which courses are required, what year of the program that courses are taught, the

74. *Id.* at 50, 65-66.

75. Kloppenberg, *supra* note 1, at 118-136.

76. David M. Moss, *The Hidden Curriculum of Legal Education: Toward a Holistic Model for Reform*, 2013 J. DISP. RESOL. 19, 24 (2013).

77. *Id.* at 27.

78. *Id.* at 23. Curriculum mapping can certainly document the coverage of various subjects in a curriculum but need not be limited to that focus. For example, the University of Missouri Law School has conducted a survey to determine the skills covered in each course as well as the types of simulations, writing assignments, other learning activities, and assessment methods used.

79. *Id.* at 28-29.

80. *Id.* at 20, 26-27.

81. *Id.* at 22.

82. *Id.* at 20, 77.

83. See Glesner Fines, *supra* note 37.

84. *Id.* at 174. Professor Kloppenberg cites the 2010 ABA Curriculum survey noting that law schools have increased clinic and externship courses since 2002. Kloppenberg, *supra* note 1, at 113. Although these opportunities have increased, they generally remain a relatively small part of the legal curriculum. *Id.*

number of credits assigned to various courses, whether courses are graded (or taught pass-fail), and even the design of classrooms, among others.⁸⁵ The status of faculty teaching particular types of courses can have a major impact on curricular decisions and these differences are “rife with political and emotional tensions.”⁸⁶

Curriculum mapping, if not done thoughtfully, risks getting tangled up in what Glesner Fines calls the “curse of coverage.” She notes that the “ever-present drive for ‘coverage’ implicit in the growing size of course books and the press of the ‘mile wide and inch thick’ bar examination lends advantage to the ‘breadth’ side of the equation in the battle between depth and breadth.”⁸⁷ She argues that the goal of maintaining or increasing the amount of coverage is “rarely critically analyzed” and may conflict with the goal of increasing skills instruction.⁸⁸ Moreover, coverage is not the same as student learning. Just because instructors “cover” material does not mean that students absorb and retain it; there is a point of diminishing returns where providing more coverage does not appreciably increase the amount of learning. Indeed, incorporating some skills instruction may actually increase doctrinal learning.⁸⁹ These observations suggest the importance of conscious consideration of law schools’ curricular goals as part of a mapping process.

Law schools have numerous goals and commitments, which sometimes reinforce each other and sometimes conflict. Schools that want to make systemic changes in their educational programs must set goals and priorities. In particular, schools wanting to improve their practical education should consider what particular skills and teaching methods they want to focus on.⁹⁰ This analysis is especially important because practical education is relatively expensive as compared with doctrinal instruction. So schools must make strategic decisions about how to invest their limited resources of money and, perhaps more importantly, faculty and staff time.⁹¹ These decisions include whether to promote skills instruction in specific courses, integrate skills training throughout the curriculum, or both, as well as decisions about what particular skills are most important and what level of

85. See Moss, *supra* note 76, at 21-22.

86. Glesner Fines, *supra* note 37, at 179. She writes:

Those faculty who most identify with skills instruction are also those faculty who have struggled with lower status, lower salaries, lesser job security, and limited franchise in faculty governance. Long-felt and angry divisions between tenure-track (“doctrinal” “casebook”) faculty and other full-time faculty (“professional skills” “clinical” “legal writing” “librarian”) faculty thus become part of the conversation about curriculum. *Id.*

87. Glesner Fines, *supra* note 37, at 184. See also Lande & Sternlight, *supra* note 9, at 273; Moss, *supra* note 76, at 30.

88. Glesner Fines, *supra* note 37, at 176.

89. *Id.* at 184. She writes:

Is there a course in the curriculum for which all the doctrine, rules, policies and context could be covered – even in cursory fashion – in fourteen weeks? For deep and transferable learning, we must aim for higher levels of proficiency, which requires thoughtful choices about the scope of doctrine (and skills) for which we desire that proficiency.

Id. Moreover, incorporating skills instruction in doctrinal classes can actually promote learning of both the skills and doctrinal material. *Id.* at 191.

90. *Id.* at 160.

91. For example, schools that increase the amount of skills instruction may need to decrease the number of elective doctrinal courses. See Kloppenberg, *supra* note 1, at 125.

student competence is expected.⁹² Possible criteria for emphasizing particular skills include centrality of the skills to the practice of law, consequences of poor development of certain skills, and values of law schools' stakeholders.⁹³

There is an increasing appreciation of the importance of the assessment of students' learning because the assessment process can drive teaching and learning. Professor Wegner argues that assessment in law schools generally is very problematic, often consisting of a single "summative" experience in a course—a final exam—based on predetermined grading norms instead of achievement of specified criteria.⁹⁴ Based on these problematic measures, faculty "rank" top students, "weed" out those who are unlikely to succeed at the end of the day, and approximate the relative performance of those in the middle.⁹⁵ The assessment process itself may bias the results for students who are subject to "stereotype threats"—those who perform poorly precisely because they expect to do worse because of certain stereotypes.⁹⁶ The traditional assessment regime can be particularly problematic for "slow starters," considering the great social significance of grade point averages and the difficulty in increasing GPAs after the first semester or two.⁹⁷

Professors Wegner and Glesner Fines argue that focusing on assessment provides an opportunity for law schools to re-conceive the meaning of educational quality and broaden their priorities for students' learning outcomes.⁹⁸ Indeed, the ABA is considering new standards that would require law schools to define the intended learning outcomes for their students and to use both formative and summative assessment methods to assess and improve students' learning.⁹⁹ In contrast to summative assessment, "formative" assessment involves feedback during a semester to enhance the learning process. Glesner Fines notes that "[e]ducational researchers have demonstrated that students learn more and better when learning goals are clear, when they are given opportunities to practice what they are learning, and when they receive feedback on their learning."¹⁰⁰ Adding some formative assessment techniques (such as group exercises, in-class polls using "clickers," or short ungraded quizzes) may not require a great deal of additional faculty time and effort. Providing a substantial amount of effective formative feedback is, however, likely to require considerable extra time beyond what faculty currently invest in a course, presumably at the expense of reducing coverage to some extent. As a result, law faculty and schools that want to substantially increase the amount of formative assessment should consider whether they are willing to reduce the amount of coverage to some extent. Starting with the premise that "assessment drives learning," faculty can engage in "backward design," where they first identi-

92. See Glesner Fines, *supra* note 37, at 176-177, 183. For additional discussion of integrating teaching of legal knowledge and skills, see Cunningham, *supra* note 13, at 151-154; Oliver, *supra* note 29, at 86.

93. See Glesner Fines, *supra* note 37, at 160-161; Kloppenberg, *supra* note 1, at 104; Moss, *supra* note 76, at 30.

94. Wegner, *supra* note 13, at 56.

95. *Id.* at 57.

96. *Id.*

97. *Id.*

98. Glesner Fines, *supra* note 37, at 184-193; Wegner, *supra* note 13, at 137-139.

99. See Kloppenberg, *supra* note 1, at 138.

100. Glesner Fines, *supra* note 37, at 184.

fy learning objectives and then develop their courses, including assessment procedures, designed to achieve those objectives.¹⁰¹

IV. OPTIONS FOR REFORM

Prescriptions for educational reform can make it sound easy. It is not. As described in Part II, law schools are the focus of multiple, intense pressures, many of which can lead to stalemate and inertia. Concerned about pressures leading to inaction, Professor Jean Sternlight and I recommended approaches that individual faculty could use to improve practical instruction without needing anyone else's approval.¹⁰² Starting with these ideas, the ABA Section of Dispute Resolution established the Legal Education, ADR, and Problem-Solving (LEAPS) Project, which developed materials and established panels of consultants to help faculty who want to incorporate more instruction in practical problem-solving in their courses.¹⁰³

Of course, some law schools can engage in a strategic planning process leading to a comprehensive set of reforms. The University of Dayton Law School provides one model of such an approach. The Dayton program consists of new graduation requirements that include an ADR course, an externship or clinic course, and a capstone experience. It offers additional upper-level Legal Profession Program courses focused on legal writing, short courses, optional subject-area concentrations, an accelerated option for students to graduate in two years, and new extracurricular activities, including a pro bono program. As one might expect, it took some time to plan and implement the program, it was not fully implemented all at once, and the law school evaluated and modified some elements of the program as time went on.¹⁰⁴ As this example illustrates, it can be helpful to undertake reform as part of a comprehensive strategic reform process, recognizing that major changes will likely require an extended period of time to implement optimally, and that periodic evaluations may be necessary to consider possible revisions. Undertaking reforms as part of such a comprehensive process may not work well for some schools, which may do better by developing a number of discrete, incremental initiatives.

Using either a comprehensive or incremental approach, schools can consider various options to improve students' readiness to practice upon graduation. Regardless of the process of developing an educational program, Professor Moss argues that they should have the same general educational process: "Students learn best when they are able to apply doctrine through experiential learning and transfer that learning to real world contexts. Such connectedness of knowledge, application, and transfer should be the hallmarks of legal education."¹⁰⁵ At the University of Dayton, they call this "educating law students' 'heads, hands, and hearts'."¹⁰⁶ Increasing skills instruction can be especially important for students

101. *Id.*; Wegner, *supra* note 13, at 58.

102. See Lande & Sternlight, *supra* note 9, at 276-90.

103. *Legal Education, ADR, and Practical Problem-Solving (LEAPS) Project*, *supra* note 11.

104. Kloppenborg, *supra* note 1, at 118-136.

105. Moss, *supra* note 76, at 30.

106. Kloppenborg, *supra* note 1, at 108 (referring to the three "apprenticeships" cited in the Carnegie Report, of academic knowledge, lawyering skills, and professional identity).

who have not excelled academically, providing a pathway to greater motivation and learning.¹⁰⁷

The most direct way to increase students' experience applying legal knowledge and skills to real cases is to increase the number of clinical and externship opportunities.¹⁰⁸ Clinical courses provide greater direct instruction and control than externships but at a higher cost. Thus schools should consider the best mix given their circumstances. Ideally, every law student would take at least one clinical or externship course, though that may not be feasible in some schools.

A second approach would be to increase instruction in important legal skills. Although law schools have increased instruction in legal research and writing in recent years,¹⁰⁹ there is evidence that law graduates' legal research skills remain poor;¹¹⁰ the need to improve students' research and writing skills remains. Professor Glesner Fines notes that, although important law school constituencies believe that developing students' legal research skills should be a high priority, it generally is not for many faculty members.¹¹¹ Similarly, Judge Oliver recommends increasing the focus on teaching students legal writing, especially practice-focused writing such as motion documents.¹¹² As an example of different types of writing assignments, students in Professor Kloppenberg's ADR capstone course write a mediation statement, strategy memorandum, a reflective essay, and a research paper.¹¹³

Professor Cunningham highlights the importance of teaching students communication skills. Although students, faculty, and lawyers may assume that lawyers generally do a good job of client communication, many clients disagree. Cunningham presents data showing that clients reported great dissatisfaction with poor communication skills (due to inadequate listening and explaining by lawyers), which they felt more frequently than dissatisfaction with the outcome or cost of the matter, as many lawyers might assume.¹¹⁴ Although this data focuses on communication with clients, presumably many lawyers do not communicate optimally with others, including counterpart lawyers, judges, witnesses, and jurors. Of course, students can practice communication skills in courses on interviewing, counseling, and negotiation, among other skills courses, possibly using standardized client assessment forms. It can be relatively easy to add elements of communication skills in other courses as well. For example, in doctrinal courses, faculty can ask students to explain to the teacher, acting as a client in a matter, whether there is a cause of action, what are possible defenses, or other doctrinal

107. Kloppenberg, *supra* note 1, at 110.

108. See Kloppenberg, *supra* note 1, at 108-110; Oliver, *supra* note 29; Phillips, *supra* note 28.

109. See Kloppenberg, *supra* note 1, at 110-114 (summarizing findings of the ABA's 2010 Curriculum Survey).

110. See Glesner Fines, *supra* note 37, at 167-168 (summarizing results of various studies).

111. Glesner Fines, *supra* note 37, at 162.

112. Oliver, *supra* note 28, at 85 (advising clerks that it is most important to have good research and writing skills as new lawyers). See also Kloppenberg, *supra* note 1, at 128 (describing relatively short and non-traditional kinds of writing assignments in response to employers' desire for graduates with more writing experience).

113. Kloppenberg, *supra* note 1, at 123. Other capstone courses at Dayton require students to prepare manuals for prosecutors and law enforcement officials dealing with cybercrime, documents used in the development of an actual shopping mall, and other transactional documents. *Id.*

114. Cunningham, *supra* note 13, at 144-145.

issues that the faculty want to teach.¹¹⁵ In professional responsibility courses, faculty can cover the doctrinal material through simulated lawyer-client meetings.¹¹⁶ To train students to communicate effectively with clients both orally and in writing, faculty can assigned them to write engagement letters defining the scope of representation or letters advising clients about whether to accept a settlement offer.¹¹⁷

Law schools can increase instruction in dispute resolution methods, which is particularly important considering that lawyers frequently represent clients in processes other than court hearings.¹¹⁸ John Phillips reported that, in his practice, he is often involved in mediations even before law suits are filed because many clients want to resolve disputes efficiently and avoid litigation.¹¹⁹ Dispute resolution courses are among the most common law school skills courses¹²⁰ and schools like the University of Dayton require students to take a course covering dispute resolution.¹²¹ Judge Oliver argues that it is particularly important for students to learn about case management, starting with judicial status conferences, where lawyers must be prepared to discuss dispute resolution options and a wide range of other matters.¹²²

Law schools can experiment with non-traditional course formats, such as short, not-for-credit professionalism courses at the outset of students' legal education,¹²³ specialized for-credit short courses,¹²⁴ and in-depth capstone courses that provide a culminating learning experience.¹²⁵ At Dayton, for example, all students are required to take a three-or-four-credit capstone course in which they apply legal knowledge and skills they learned in prior courses to work on complicated issues. The capstones include an intensive, upper-level writing experience.¹²⁶ Considering the intensive work involved in teaching capstone courses, including both theoretical and practical knowledge, schools may arrange for regular and adjunct faculty to co-teach such courses.¹²⁷ Schools can also arrange for sequences of related courses so that students can readily concentrate in particular

115. *Id.* at 150.

116. *Id.* at 150-151. Simulations in professional responsibility courses can also include interactions with counterpart lawyers and judges. See Oliver, *supra* note 28, at 89 (arguing that lawyers must understand that being a good advocate does not require lawyers to "engage in offensive tactics, discourteous behavior, or to disagree to requests of opposing counsel that cause no prejudice to their client" and requires candor in submissions to courts).

117. Cunningham, *supra* note 13, at 153; Oliver, *supra* note 28, at 89 (describing observations of lawyers who had not adequately advised their clients about settlement options).

118. See Lande & Sternlight, *supra* note 9, at 265-67.

119. See Phillips, *supra* note 29. See also Kloppenborg, *supra* note 1, at 122 (setting out the University of Dayton Law School's vision of legal education).

120. Kloppenborg, *supra* note 1, at 117 (citing data from the 2010 ABA Curriculum Survey).

121. *Id.* at 128.

122. Oliver, *supra* note 28, at 92-93.

123. Kloppenborg, *supra* note 1, at 131.

124. *Id.* at 130.

125. *Id.* at 123. The ABA is considering a requirement that every student must take an upper-level experiential course integrating legal doctrine, theory, skills, and ethics where students must perform professional skills. *Id.* at 138.

126. *Id.* at 123-125.

127. See Kloppenborg, *supra* note 1, at 128 (describing experience team-teaching an ADR capstone course with a federal judge); Oliver, *supra* note 28, at 88.

areas as part of a comprehensive plan in which they receive instruction in particular sets of knowledge and skills.¹²⁸

If possible, law schools should analyze their educational programs holistically, including the “hidden curriculum,” rather than simply as a collection of courses.¹²⁹ Moreover, in an optimal legal education, students take responsibility for directing their own learning rather than simply reacting to curriculum options presented to them.¹³⁰ Academic support and advising are critical elements of students’ learning experiences, as they provide a framework for students’ curricular and extra-curricular choices.¹³¹ Portfolio systems, for example, can help student set their own learning goals for their law school careers and provide a mechanism for students to track their progress.¹³² Schools can also develop easy-to-use websites to help students navigate their curricular choices, like William Mitchell College of Law’s “Pathways to the Profession of Law” system.¹³³

V. CONCLUSION

Law schools will face an incredible number of intense pressures in the coming years.¹³⁴ Some of the pressures will push schools to reform their educational programs in order to increase practical education, while others will push schools in different directions. Professor Wegner, a former president of the American Association of Law Schools and co-author of the Carnegie Report, summed up the challenges of legal education reform:

Research . . . reveals that developing new cornerstone concepts to underlie legal education will not be an easy process. Deans and faculty members engaged in reform processes will need to recognize that the task of education reform is much more complex than they might otherwise have expected. The process of deliberation is not likely to yield simple choices based on easy logic as to possible change, but will instead result in best estimates of potential changes and their value (subject to ongoing evaluation). Choices are not likely to involve options between two choices with clear evidence in support of one or the other, but instead options for “best guesses” regarding ways to proceed, with needed post-choice assessment to determine how well the choices made are operating (leading to possible future changes). Deans and faculty members also

128. Kloppenberg, *supra* note 1, at 129-30.

129. Moss, *supra* note 76, at 20.

130. See Wegner, *supra* note 13, at 40-43 (discussing education scholars Robert Kegan’s and Lisa Laskow Lahey’s framework of students’ progression from a “socialized mind” to a “self-authoring mind” to a “self-transforming mind”).

131. See Kloppenberg, *supra* note 1, at 115, 139.

132. See generally Deborah Jones Merritt, *Pedagogy, Progress, and Portfolios*, 25 OHIO ST. J. DISP. RESOL. 7 (2010).

133. See William Mitchell College of Law, *Pathways to the Profession of Law*, available at <http://web.wmitchell.edu/pathways/>.

134. See *supra* Part II.

need to appreciate their limitations and the need to tap non-traditional expertise to assess how best to proceed in the long term¹³⁵

Of course, law schools will continue to pursue vigorous scholarly work and provide solid doctrinal instruction regardless of any changes to increase practical instruction. Professor Kloppenberg, Judge Oliver and John Phillips—a former dean, a judge, and practitioner—specifically highlighted the importance of providing good instruction in legal doctrine and all the symposium speakers accept that as a given.¹³⁶ Nonetheless, it may be important to emphasize this reality to accurately portray the result of planned reforms. It is also important to reassure colleagues who focus on scholarship and/or teaching doctrinal subjects that their work will continue to be valued because that may not feel obvious during extended discussions about increasing the amount of practical instruction. At the same time, faculty and staff who do most of the work in practical education—such as faculty who teach legal research and writing, skills, clinics and externship courses as well as librarians—may also feel vulnerable and/or invisible because they usually have less power and prestige in law schools.

Deep discussions of educational reform can touch very sensitive issues of professional identity in which almost everyone may feel some emotional risk about their perceived value (or lack thereof). In some schools, these concerns and tensions are not acknowledged or handled well, which can block progress in educational reform. A healthy dose of explicit mutual respect for everyone's contributions can greatly help the process. Even when faculty and staff have good personal and professional relationships, law schools contemplating significant reform are likely to have difficult conversations about such issues as allocation of resources, faculty hiring priorities, learning outcome goals, curricular requirements, teaching packages, amount of credit and coverage of various course topics, and learning assessment methods, among others.¹³⁷ Deans, committee chairs, and other administrators must provide necessary leadership and “grassroots” faculty leadership is important as well.¹³⁸

Although educational reform is very difficult, it will be necessary for most law schools to undertake some reforms, in part for healthy survival in a challenging environment with shrinking enrollments, innovative competitor law schools, and employers demanding better-trained graduates. Reforming legal education to produce more effective lawyers is not only in schools' self-interest, but it is also important to fulfill commitments to our stakeholders including students, alumni, legal employers, courts, clients, and society generally.

135. Wegner, *supra* note 13, at 55.

136. Kloppenberg, *supra* note 1, at 122; Oliver, *supra* note 28, at 101; Phillips, *supra* note 29. See also Moss, *supra* note 76, at 19-20 (arguing that law schools do not have an either-or choice between teaching doctrinal knowledge and legal skills).

137. For useful suggestions in having difficult conversations, see DOUGLAS STONE, BRUCE PATTON, & SHEILA HEEN, *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* (1999).

138. See Wegner, *supra* note 13, at 40.